1987

First Security Bank of Utah, N.A., and First Security Financial v. Banberry Development Corporation, et al.; Eugene L. Kimball v. Banberry Development Corporation, et al. : Horman and Banberry Parties' Answer and Brief Opposition to Kimball's Petition for Rehearing

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT OF THE STATE OF UTAH

FIRST SECURITY BANK OF UTAH, N.A., and FIRST SECURITY FINANCIAL,	:	
Plaintiffs,	:	
vs.	:	
BANBERRY DEVELOPMENT CORPORATION, et al.,	:	
Defendants.	:	Case No. 870034
	:	Consolidated No. 870074
EUGENE L. KIMBALL,	:	
Cross-Claimant-Respondent,	:	
vs.	:	
BANBERRY DEVELOPMENT CORPORATION, et al.,	:	
Cross-Defendants-Appellants.	:	

HORMAN AND BANBERRY PARTIES' ANSWER AND BRIEF IN OPPOSITION TO KIMBALL'S PETITION FOR REHEARING

On Appeal from the District Court of Summit County
Honorable Timothy R. Hanson, District Judge

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This Answer is submitted pursuant to Rule 35 R. Utah S. Ct. by Appellants, Banberry Development Corporation, Banberry Crossing (collectively "Banberry") and Sidney M. Horman ("Horman") in opposition to the January 30, 1990 petition for rehearing of respondent Eugene L. Kimball ("Kimball") from this Court's opinion of January 2, 1990.

SUMMARY STATEMENT OF POSITION

Kimball's Petition for Rehearing of the January 2, 1990 Opinion consists of two arguments. The first is that this Court did not delineate in its opinion all of the factual claims which Kimball believes are important to a resolution of the fraud issue on appeal. In advancing such argument, Kimball makes no showing that this Court "overlooked or misapprehended"[1] the extended factual arguments made by Kimball in the appeal. The fact that the Court's opinion does not track down and respond to each one of Kimball's "badges of fraud" arguments does not at all suggest, much less warrant, the conclusion that the argument was overlooked or misapprehended.

Kimball's fraud arguments in his Petition are merely repetition of the same arguments made in the main appeal. Duplicative arguments already once rejected or determined to be inapposite by the Court are not the proper basis of a rehearing petition under the controlling precedent.

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[1] Rule 35(a) of this Court's rules requires that a petition for rehearing state with particularity the points of law or fact which it is claimed "the court has overlooked or misapprehended**."

Secondly, Kimball presents for the first time the question of Horman's and Banberry's standing to raise the "payment" issue on appeal. Contrary to Kimball's position, Horman and Banberry do have interests that were adversely impacted by the "payment" verdict and judgment and both have requisite standing to appeal. Beyond that, Kimball has attempted to raise the "payment" issue for the first time on rehearing after having already taken his position and submitted expansive argument on the merits of the "payment question" in the main appeal. Having lost that position and argument under the Court's opinion, Kimball now urges that there was no standing or jurisdiction to raise the issue on appeal in the first instance. This Court has not looked with favor on such practice or strategy.

Kimball's Petition for Rehearing is unsupported in law and should be rejected.

POINT I.

CONTRARY TO KIMBALL'S PETITION, THE FACTS MATERIAL TO THE RATIONALE OF THE COURT'S OPINION WERE NOT OMITTED.

Kimball begins his argument on the erroneous note that in a case of significant factual complexity, the Court's Opinion spends only one and 1/2 half pages outlining the facts. (Kimball Pet. p. 2.) Kimball argues from this that his "badges of fraud" argument was not given appropriate weight by the Court and that a rehearing should be granted to allow consideration of such matters and corresponding amendment to the Court's Opinion.

To begin with, the Court's recital and analysis of the facts in its Opinion surrounding the fraud issue are not confined to one and 1/2 pages as alleged by Kimball. Although it would be no diatribe if the allegation were correct, it is not correct. The Court's factual analysis runs throughout the first 17 pages of the slip Opinion and is found particularly on pages 2-3, 10-13 and 17-18. Kimball's so-called "badges of fraud" are discussed generally although not, perhaps, with the glowing tilt and the detailed labels of Kimball's argument.[2] Secondly, this Court is not required to recite each and every factual claim or argument raised in an appeal. State v. Carter, 776 P.2d 886, 888 (Utah 1989) ("This Court need not analyze and address in writing each and every argument, issue, or claim raised and properly before us on appeal.") (Opinion by Hall, C.J.); Phelps Dodge Corp. v. Arizona Indus. Comm'n., 90 Ariz. 379, 368 P.2d 450 (1962); Grand Lodge, Etc. v. Hermoine Lodge No. 16, Etc., 258 Ala. 641, 64 So. 2d 405 (1952) (appellate court not required to reproduce all of the trial evidence in its opinion where record is voluminous). The judicial task would be endless if that were the case. Rather, it is sufficient if the Court has given reasonable consideration to the facts surrounding the issues which the Court determines will govern the appeal. Carter, 776 P.2d at 888-89; Phelps, 368 P.2d at 451.

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[2] January 2, 1990 Slip Opinion, pp. 4-6; 13-14.

In its January 2 Opinion, this Court at the threshold focused on what it determined to be the "dispositive issue on appeal" relative to Kimball's fraud claim. Slip Op. at 3. That issue was clearly defined as one of duty -- viz., whether a duty existed on the part of Horman, Banberry, First Security Bank and the Horman Trust to disclose to Kimball the existence and contents of their settlement and purchase agreement. The Court thereupon undertook a penetrating analysis of the legal duty to disclose facts not only as between senior and junior lien-holders, but also in the specific context of the facts before the Court.

The Court reached the conclusion that there was no special, confidential, or fiduciary duty as between Horman, the Bank or Banberry and Kimball that would have imposed a legal duty of disclosure. The Court's conclusion was reached in full light of the evidence and the extenuated argument of the parties. No single piece of evidence cited by the Court in its Opinion is alleged by Kimball to be inaccurate or unfounded. Kimball's argument comes down to no more than a desire to rewrite the Court's opinion so as to specifically keynote its exaggerated badges of fraud argument, without the slightest showing that the Court failed to consider those claims in its analysis of the "duty" issue. The Court's Opinion set out a concise but substantial exposition of the relevant, objective facts that were reasonably required for the resolution of the

duty issue. The nature and development of the Opinion is fundamentally a matter of discretion for the Court.

Part of the difficulty of Kimball's petition is that it does not demonstrate how the end result in this appeal would change if this Court were to somehow rewrite its Opinion to Kimball's desire. Salt Lake City v. Telluride Power Co., 82 Utah 622, 26 P.2d 822 (1933). Since the Court found that resolution of the duty issue was dispositive of the appeal, Slip Op. at 3, 13, 16, the Court found it unnecessary to address the other elements of fraud which equally plagued Kimball's position herein. Kimball was faced with the obstacles of demonstrating the nature of the false misrepresentation of fact, reliance by Kimball, and damages, as well as how the fraud verdict could stand against Horman and Banberry without a wholesale rewriting of Pace v. Parrish, 122 Utah 141, 247 P.2d 273 (1953). Lastly, the factual hypothesis in Kimball's petition, p. 8, that the subject settlement agreement expressly provided that it would be kept secret until Kimball lost his lien, is, at minimum, a vast hyperbole unsupported in the factual record.

These obstacles cannot be overcome or the exaggerated assumptions sustained in Kimball's petition for rehearing. It should be denied.

POINT II.

HORMAN AND BANBERRY HAD STANDING TO RAISE THE PAYMENT ISSUE ON APPEAL AND KIMBALL IS JUDICIALLY ESTOPPED FROM ARGUING OTHERWISE.

The second point in Kimball's Petition is that Horman and/or Banberry lacked standing to appeal the verdict and judgment on "payment" of the Bank's senior lien. Lack of standing, it is argued, deprives this Court of the power to hear or decide the issue of payment and thus, the petition argues that a significant portion of the Court's Opinion which addresses the "payment" issue and finds reversible error in the trial court judgment should be reheard and set aside.

This is a new argument for Kimball, never before advanced. It is not only new as to the trial court proceedings, it is new in the main appeal of this case. Indeed, Kimball has consistently presented argument to the trial court and to this Court that assumed, by definition, full standing of Horman and Banberry to raise and argue the "payment" question.

Throughout his main brief on appeal, Kimball blithely and continually refers to Horman and not the Horman Trust as the party who was bound by the "payment" verdict and judgment.[3] Typical of those statements are the following:

> . . . When payment was discovered, First Security and Sidney Horman denied it, as they do to this day. They refused to reconvey the First Security trust deeds . . . They clouded Kimball's lien

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[3] Kimball July 22, 1988 Brief, pp. 2, 4-5, 9, 12, 23-29, 31-34, 36, 44, 51-54, 60-61, 73-74, 77, 79, 83-84, 87-91, 93.

> from 1984 to 1987 and enjoined him from foreclosing . . .
>
> "Horman's paying the First Security loans in secret while arranging to have the Bank remain in title to the liens and appear to foreclose its loan . . . was a fraud on Kimball."

Kimball Resp. Br. pp. 4, 5.

1. **Standing of Horman to Raise the Payment Question is Clear.** The legal principle of standing is well recognized in the case precedent of this Court. Society of Professional Journalists v. Bullock, 743 P.2d 1166 (Utah 1987); Terracor v. Utah Board of State Lands, 716 P.2d 796 (Utah 1986). Standing does not turn upon abstract or academic argument, Society of Professional Journalists, 743 P.2d at 1174, but will be viewed within the reality of facts as to the specific interest and impact that the judgment will have upon the individual's interest. Terracor, 716 P.2d at 799. The underlying legal policy is thus stated by this Court:

> "The doctrine of standing is intended to assure the procedural integrity of judicial adjudication by requiring that parties to a lawsuit have a sufficient interest in the subject matter of the dispute and sufficient adverseness that the legal and factual issues which must be resolved must be thoroughly explored."

Id. at 798.

Kimball is in error in arguing that the "payment" verdict and judgment in the trial court had no adverse impact upon Sidney M. Horman. In law, Horman had standing to appeal the payment verdict to this Court for a number of reasons. To begin with, Horman was directly and adversely affected by the "pay-

ment" judgment, because the finding of payment was absolutely essential to Kimball's fraud claim against Horman. Kimball's alleged claim of fraudulent concealment was premised on the argument that the Bank's liens were extinguished by the undisclosed "payment" agreement. Horman thus had standing to appeal the fraud verdict and to challenge the underlying payment verdict.

Moreover, the transaction between the Bank and the Horman Trust, through Sidney Horman as trustee, was part of a larger settlement agreement involving other properties in which Horman and the Banberry interests were involved. The "payment" verdict and judgment had an impact upon the larger settlement agreement that would be binding upon both Horman and the Banberry interests.

Furthermore, Horman was sued, appeared and defended in the case on the question of "payment." He was alleged to be the alter-ego of the Trust and Banberry and the Trust was impacted to that extent. Horman was seriously prejudiced by the payment verdict, for if allowed to stand, it meant that the Horman Trust would have delivered $1,600,000 to the Bank for the purchase of the Bank's senior lien rights, without receiving any consideration therefor.

Additionally, Horman was significantly prejudiced by the "payment" verdict for purposes of res judicata. If the "payment" judgment had not been reversed by this Court for prejudicial error in the instructions to the jury, there is little

doubt that Kimball would have taken the position that said verdict and judgment would be res judicata to Horman in his individual, as well as his fiduciary, capacity as trustee for the Horman Trust. Therefore, the Trust may be bound by the payment verdict because the trustee was before the trial court and defended against Kimball's "payment" claim.[4]

Both Banberry and Horman had standing to appeal the "payment" verdict and judgment because of the First Jury Verdict which this Court, on appeal, found to be prejudicial and reversible error. Interrogatory No. 4 of the First Special Verdict questioned the jury as to whether "the transfer of $1.6 million to First Security Bank and First Security Financial constituted a 'payment' from Banberry Crossing to First Security Bank and FSF of the trust deed notes?" (Emphasis added.) (See Attachment 1.)

This Court, in its January 2, 1990 Opinion at p. 21, found that special verdict to be prejudicial error, because even if there were a "payment" rather than "purchase" of the trust deed notes, the payment under all of the evidence did not come from Banberry. See Slip Op. at 21. Clearly, Banberry had standing to appeal the special verdict on "payment" against

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[4] Provident Tradesmens B. & T. Co. v. Patterson, 390 U.S. 102 (1968) (Appellate Court should protect an absent party whose interest may be affected by a judgment that as a practical matter impairs or impedes its ability to protect its interest); Hendrick v. Mitchell, 320 Mass. 155, 69 N.E.2d 466 (1946) (Trustee had standing to appeal an order advantageous to a trust where it exposed trustee to potential liability).

which it had defended and lost. Horman was the "common factor" between Banberry and the Trust and he, as well, was prejudicially impacted and had standing to appeal the First Jury Verdict on "payment".

Lastly, both Horman and Banberry had standing to appeal the payment verdict because of its prejudicial impact upon the subsequent fraud instructions, Instruction No. 19 in particular. In the Second Jury Verdict and at Kimball's request, the trial court charged the jury that for the purpose of determining the culpability of Horman and Banberry for the alleged fraud, the October 1984 agreements were between the Bank, Banberry, Sidney Horman and others. The very integration of the "payment" verdict as part of the "fraud" verdict against Sidney M. Horman and Banberry provided more than the requisite standing in which to appeal the "payment" verdict and judgment.

The public policy underlying the standing principle is fully served by the appeal on the "payment" verdict and judgment. If this Court's opinion on the "payment" verdict were now reversed on rehearing, First Security could not perform under its settlement agreement with the Banberry parties and the Trust. The Trust could be irreparably damaged and Horman exposed to potential liability as trustee. On this point, alone, Horman has standing under the precedent of Terracor to challenge the "payment" verdict and judgment.

2. Kimball's Claim as to Standing on Rehearing is the Categorical Antithesis of His Argument Below and in the Main

Appeal. In making his argument on standing, Kimball was aware of the ruling case law of this Court that new issues may not be raised for the first time on rehearing. As Justice Oaks wrote for a unanimous Court in Lockhart Co. v. Anderson, 646 P.2d 678, 681 (Utah 1982):

> "A losing party cannot use a petition for rehearing 'to present to this court a new theory or contention which was neither in the record as it was before this court, nor in the arguments made'". (Citing authority.)

Kimball acknowledges the lateness of his argument but apologetically urges that this is an "exceptional circumstance," citing Jollivet v. Cook.[5] The only "exceptional circumstance" involving the standing question is that it is first raised in a rehearing petition of an appeal in which the party had taken the opposite position, argued and lost the appealed issue. The essence of Kimball's proposition is simple. It is that he may make an elaborate argument on the substantive merits of the "payment" question in the main appeal, lose on that question and then turn around on rehearing and argue for the first time that there was no standing to address the "payment" issue and argument in the first place.

Kimball spent nearly 40 pages of his main brief on appeal on the "payment" question, urging that Horman as the alter-ego of Banberry, used the Horman Trust as a "straw man," or a "dummy," or as his alter-ego in making the alleged "payment" to

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[5] 784 P.2d 1148 (Utah 1989), cert. denied, 110 S.Ct. 751 (1990).

the Bank discharging the latter's senior liens. During the trial before the lower court, in resisting a motion by the defendants that Kimball had failed to join the Horman Trust as an indispensable party, Kimball resisted, arguing that it was sufficient for the trial court's jurisdiction on the question of "payment" that Horman was before the Court as the alter-ego of the Trust and Banberry.[6]

How is it that Kimball is able to make such a vigorous argument on the merits of the "payment" issue on appeal herein and then having lost thereon, now urges on rehearing the lack of legal standing to make the argument? If Kimball had prevailed before this Court on the "payment" question, would he be here on rehearing urging the Court to set aside and vacate its opinion for lack of standing?

It is to preclude a party from engaging in such inconsistent conduct that the doctrine of judicial estoppel has been recognized before this Court. As Justice Crockett put it in his concurrence on a denial of a petition for rehearing:

> ". . . it is totally foreign to my conception of fairness and justice for a party to submit his controversy to a court for adjudication, then wait to see whether he wins or loses, and when he loses to then attack the composition of the court. That this may not properly be done, see . . . citing authorities . . ."

Shippers Best Express, Inc. v. Newsome, 579 P.2d 1316 (Utah 1978).

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[6] R. 4948, Argument of Kimball's counsel at May 14, 1986 hearing, Tr. 8-11.

Justice Maughan of this Court expressed the policy behind judicial estoppel -- "the prevention of toying with judicial process." He stated:

> For my view, such toying occurs when a litigant is allowed success while maintaining inconsistent positions.
>
> The maxim 'one cannot blow hot and cold in the same breath' finds its expression in the doctrine of judicial estoppel. A litigant is not allowed to maintain inconsistent positions in judicial proceedings.

Royal Resources v. Gibraltar Fin. Corp., 603 P.2d 793, 797 (Utah 1979) (Maughan, J., dissenting).

Kimball filed his main brief in this case subject to the sanctions of Rule 11 as incorporated in Supreme Court Rule 40(a) acknowledging that the "payment" argument had the requisite standing. He is now estopped from arguing a contrary position for the first time in a petition for rehearing as to an issue which was lost in the main appeal.

Kimball's argument on standing cannot be saved by the Court exercising its authority, sua sponte, to review the question of standing. As has been demonstrated above, both Horman and Banberry were adversely impacted by the "payment" verdict in a number of ways and both had standing to bring that issue before this Court on appeal. Kimball's argument on standing is fraught with difficulty and should be rejected.

CONCLUSION

Kimball's petition for rehearing, apart from the issue of standing, is a reargument of issues that have already been

fully evaluated and resolved by the Court's opinion of January 2, 1990. Kimball does not make out even the most marginal argument that this Court has overlooked or misinterpreted critical and relevant facts to the issues which it found were dispositive of the appeal. Kimball's argument on standing is abortive for several reasons and should be rejected.

The petition for rehearing should be denied in all respects, it is

Respectfully submitted,

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February 27, 1990

CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of Campbell Maack & Sessions, 170 South Main Street, Suite 400, Salt Lake City, Utah, and that in said capacity and pursuant to Rule 5(b), Rules of the Utah Supreme Court, four copies of Horman and Banberry Parties' Answer and Brief in Opposition to Kimball's Petition for Rehearing were served upon:

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by U. S. Mail, postage prepaid.

DATED this 27th day of February, 1990.

CAMPBELL MAACK & SESSIONS

E. Barney Gesas

E. BARNEY GESAS

Attachment 1

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT

IN AND FOR SUMMIT COUNTY, STATE OF UTAH

FIRST SECURITY BANK OF UTAH, N.A., and FIRST SECURITY FINANCIAL, Plaintiffs, vs. BANBERRY CROSSING, EUGENE R. KIMBALL, et al., Defendants.	FIRST SPECIAL VERDICT CIVIL NO. 7457
EUGENE L. KIMBALL, Cross-Claimant, vs. SUMMIT COUNTY TITLE COMPANY, a Utah corporation, DON HUTCHISON and COMMONWEALTH LAND TITLE COMPANY, Cross-Defendants.	No. ..... FILED MAY 21 1986 Clerk of Summit County BY..... Deputy Clerk

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We, the jury, find the following answers to the questions propounded to us in accordance with the Court's instructions:

1. Did Summit County Title comply with the instructions of Kimball in the May 8, 1981 (Exhibit #3051) and July 8, 1981 (Exhibit #4008) letters?

Yes____ No X

(a) If you have answered question No. 1 "no," please answer this question:

Did Eugene L. Kimball release Summit County Title Company from performance of the instruction?

Yes X No

2. Was Sidney M. Horman the alter ego of Banberry Crossing or Banberry Development Corp. when the Purchase Agreement (Exhibit #1028) was made in October of 1984?

Yes X No____

3. Was Sidney M. Horman the alter ego of the Horman Family Trust when the Purchase Agreement (Exhibit #1028) was made in October of 1984?

Yes____ No X

4. In light of the Court's instruction relating to the Purchase Agreement (Exhibit #1028) and "payment" heretofore given to you, did the transfer of $1.6 million to First Security Bank and First Security Financial constitute a "payment" from Banberry Crossing to First Security Bank and First Security Financial of the trust deed notes?

Yes X No____

Dated this 16th day of May, 1986.

FOREPERSON